83-228

No.___________

IN THE

Supreme Court of the United States

October Term, 1983

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT NO. 81-1801

S & VEE CARTAGE COMPANY, INC.,
SILVERIO VITELLO a/k/a SAL VITELLO,
and ANNA VITELLO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I

WHETHER, IN THIS IMPORTANT CASE OF FIRST IMPRESSION, AN EMPLOYER AND ITS OFFICERS MAY BE HELD CRIMINALLY LIABLE UNDER 18 USC § 1027 FOR MAKING FALSE STATEMENTS ON REPORTING FORMS SUBMITTED TO PENSION AND WELFARE FUNDS, THEREBY TRANSFORMING HUNDREDS OF PRESENTLY PENDING CIVIL SUITS INTO POTENTIAL CRIMINAL INDICTMENTS OF EMPLOYERS REQUIRED TO CONTRIBUTE AND REPORT TO SUCH FUNDS.

LIST OF PARTIES

The parties to this proceeding in the United States Court of Appeals for the Sixth Circuit were as follows:

1. S & Vee Cartage Company, Inc., Defendant-Appellant.
2. Silverio Vitello, Defendant-Appellant.
3. Anna Vitello, Defendant-Appellant.
4. United States of America, Plaintiff-Appellee.

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The Petitioners, Silverio Vitello, Anna Vitello and S & Vee Cartage, by their attorney, David F. DuMouchel, pray that a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit to review its decision entered on April 14, 1983, and reported at 704 F 2d 914 (6th Cir. 1983), and the denial of the Petition for Rehearing entered on June 3, 1983.

OPINIONS BELOW

The Judgment and Commitment of the United States District Court for the Eastern District of Michigan, Southern Division, of December 17, 1981, is unreported, but is set forth in Appendix B herein.

The Opinion of the United States Court of Appeals for the Sixth Circuit of April 14, 1983, is reported at 704 F 2d 914 (6th Cir. 1983) and is set forth as Appendix C herein.

The Order of the United States Court of Appeals for the Sixth Circuit denying the Petition for Rehearing on June 3, 1983, is unreported, but is set forth in Appendix D herein.

The Order of June 16, 1983 Staying Mandate is set forth in Appendix E herein.

JURISDICTION

The Opinion and Decision of the United States Court of Appeals for the Sixth Circuit were entered on April 14, 1983; Petition for Rehearing was filed on April 28, 1983 and Denied on June 3, 1983. The jurisdiction of this Court is invoked under Title 28, USC § 1254(1).

STATUTES INVOLVED

18 USC § 1027,2. (False statements and Concealment of facts in relation to documents required by the Employee Retirement Income Security Act of 1974), (Appendix A, *Infra*).

29 USC § 1002 (ERISA Definitions) Appendix A.

29 USC § 1003 (ERISA) Appendix A.

29 USC § 1021 (Duty to Reporting and Disclosure) Appendix A.

29 USC § 1022 (ERISA plan) Appendix A.

29 USC § 1023 (Annual Reports) Appendix A.

29 USC § 1024 (Filing) Appendix A.

29 USC § 1027 (Retention of Records) Appendix A.

STATEMENT OF THE CASE

This case, essentially, involves a Detroit steelhauling company, S & Vee Cartage Company, Inc., its 100% owner, Mrs. Anna Vitello, and her husband, the Corporation's president, Silverio (Sal) Vitello. It also concerns two Teamster's Locals, 299 and 124, and two separate Employee Benefit Funds, the Central States, Southeast and Southwest Areas Pension Fund and the Michigan Conference of Teamsters Welfare Fund. (T.T. 10-29-81, pps. 1935-1940).

This case also involves the first criminal trial of an employer for making false statements on reporting forms submitted to pension and welfare funds per 18 USC § 1027. Heretofore, the ongoing disputes between the funds and employers over which employees are eligible for contributions have been handled through civil suits. (T.T. 10-28-81, pps. 551-560; 1886-1900).

On March 24, 1981, Mr. and Mrs. Vitello, and the S & Vee Cartage Company, Inc. were charged jointly in a twenty-three (23) Count Indictment with making false statements to one or the other of these Funds concerning which drivers of S & Vee were eligible for employer contributions to the fund (Counts I-XX), contrary to 18 USC §§ 1027, 2, for Mail Fraud in sending two of these statements, (Counts 21, 22) 18 USC §§ 1341, 2, and Conspiracy to make the claimed false statements (Count 23), 18 USC § 371.

The charges covered a period from March, 1977 through December, 1979. The Indictment alleged that S & Vee Cartage Company was a party to a collective bargaining agreement, the National Master Freight Agreement and Central States Local Cartage Supplemental Agreement (NMFA), with the Teamsters, Locals 299 and 124.

The Indictment alleged that S & Vee Cartage Company was required, pursuant to the contract, to contribute to two separate funds on behalf of each "covered" employee who had been on the S & Vee payroll for 30 days or more, being required to pay a weekly contribution for each week during which the employee worked at least one day.

To facilitate the collection of such contributions, the Michigan Conference of Teamsters Welfare Fund, and the Central States, Southeast and Southwest Areas Pension Fund, provided the employer with pre-printed forms, monthly. Though each Fund's method differed somewhat, in ways not pertinent to this appeal, essentially it was intended by the Funds that the employer correctly complete the reporting form by listing each eligible employee and the weeks that employee worked, and send the form back to the appropriate Fund. Billings were computed by the Fund from the information on these forms, although audits also were utilized to arrive at the proper figures. (T.T. 10-27-81, 1776-1777) (T.T. 9-30-81, p. 418-419).

The Indictment did not charge failure to pay the money owed; it concerned the falsification, by commission or omission, of the forms sent to the Funds by S & Vee, allegedly in violation of 18 USC § 1027.

Jury trial before the Honorable James P. Churchill of the Eastern District of Michigan began September 28, 1981, and ended November 6, 1981.

Counts 1-13 each dealt with a separate monthly contribution report submitted by S & Vee to the Welfare Fund, in which S & Vee allegedly did not correctly report all of its employees who were, or were not, eligible for contributions to the Welfare Fund by S & Vee for the particular month. Neither Mr. nor Mrs. Vitello was convicted of any of these Counts. S & Vee Corporation was convicted of Counts 8-13.

Counts 14-20 each dealt with a separate monthly report, (Employee Billing Charges and Correction form) submitted by S & Vee to the Central States Pension Fund which allegedly contained the same false information. All Defendants were acquitted of Counts 14-17. Mrs. Vitello and the Corporation were convicted of Count 18. All were acquitted of Count 19. All were convicted of Count 20.

The remaining counts are not the subject of this Petition, but Count 21 charged mail fraud for mailing the alleged false August, 1978 report to the Welfare Fund. Each defendant was acquitted of that Count.

Count 22 charged mail fraud for mailing the allegedly false August, 1979 form to the Pension Fund. Each defendant was convicted of that Count.

Count 23 charged Conspiracy to make the false statements alleged in the substantive Counts. All Defendants were convicted of this Count.

Motions for Judgment of acquittal or New Trial were denied. Mr. and Mrs. Vitello were sentenced to a total of two years' imprisonment. Mrs. Vitello was fined $11,000.00; Mr. Vitello was fined $10,000.00. S & Vee Corporation was fined $25,000.00.

The convictions were affirmed by the United States Court of Appeals for the Sixth Circuit on April 14, 1983, and that opinion is reported at 704 F 2d 914 (6th Cir.

1983). Petition for Rehearing and Suggestion for En Banc Consideration was filed on April 28, 1983, and denied on June 3, 1983.

Petition for Stay of Mandate was granted on June 16, 1983.

REASONS FOR ALLOWANCE OF THE WRIT

IN THIS CRIMINAL CASE OF FIRST IMPRESSION, THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW BY RULING THAT AN EMPLOYER AND ITS OFFICERS MAY BE HELD CRIMINALLY LIABLE UNDER 18 USC § 1027 FOR MAKING FALSE STATEMENTS ON REPORTING FORMS SUBMITTED TO PENSION AND WELFARE FUNDS, THEREBY TRANSFORMING HUNDREDS OF PRESENTLY PENDING CIVIL SUITS INTO POTENTIAL CRIMINAL INDICTMENTS OF EMPLOYERS REQUIRED TO CONTRIBUTE AND REPORT TO SUCH FUNDS.

The importance of this case of first impression is impossible to overemphasize, and far transcends the interest of Defendants-Appellants here. Indeed, even if this Court agrees with the position of these Appellants, they remain convicted of other offenses in this case. They will not be freed or vindicated by this Court's acceptance of their argument. However, this particular issue, the scope of 18 USC § 1027, is too important to be "watered down" by raising other less meritorious issues on appeal to this Court in the hope of totally vacating these Appellants' convictions.

To permit the convictions of these Appellants of violating 18 USC § 1027 to stand will, literally, transform hundreds, if not thousands, of pending civil cases brought by pension and welfare funds against employers

into potential federal criminal indictments, with no requirement of proof of fraud or similar harm to the funds. This cannot be countenanced.

Counts I through XX of the Indictment charged each of the three Defendants herein with violation of 18 USC §§ 1027 and 2. In essence, each separate Count charged that the Defendants, Owner, President and Corporation itself, made false statements in certain monthly reports submitted to either the Michigan Conference of Teamsters' Welfare Fund or the Central States Southeast and Southwest Areas Pension Fund. Each monthly report was charged as a separate Count. Mr. Vitello was convicted of one of those Counts, Count 20. Mrs. Vitello was convicted of two such Counts, 18 and 20; the Corporation was convicted of 8 such counts, 8-13, 18 and 20.

The Welfare Fund and Pension Fund have provided certain forms for employers to complete, and send in monthly, which forms are completed by the employer, with certain information concerning employees for whose benefit contributions to the particular Fund are to be made. The Fund then determines the amount of money owed by the employer based upon the number of eligible employees on the payroll. (T.T. 9-30-81, pps. 363-364, 378-397. T.T. 10-8-81, pps. 449-493; 559-565. T.T. 10-27-81, pps. 1707-1735; 1744-1779).

As was brought out often during trial, there is a nearly constant dispute between the various funds and the employers concerning the employees who are eligible for such benefits, and the amount of such benefits owed on a monthly basis, just as there is a constant tension between employers and representatives of employees over interpretation of any employee bargaining contract. (T.T. 9-30-81, pps. 242-246; 337-348; 351-359). Further, *all of* these disputes have been settled, prior to this

Indictment, by negotiation between the parties, or, ultimately, by the filing of a civil suit for breach of contract. In fact, a civil suit has been filed against S & Vee Corporation, and is pending presently. (T.T. 10-8-81, pps. 491-493; 553-559. T.T. 10-28-81, pps. 1886-1889; 1895-1897).

For whatever reasons, the Government determined that it was appropriate to seek a criminal Indictment against S & Vee Cartage, Mr. and Mrs. Vitello, for what, arguably, was a violation of a collective bargaining agreement. 18 USC § 1027 was chosen as a vehicle for proceeding. However, because the Congress never anticipated that a criminal indictment would be brought against an employer for violation of a collective bargaining agreement, it did not enact a law making such infractions as those alleged to have been committed by these Defendants a crime. The Government, however, has sought to create a Statute to fit the facts. Not being content with the mail fraud and conspiracy statutes, which can be stretched to fit nearly any factual circumstance, the Government also added twenty (20) Counts alleging violation of § 1027. § 1027, however, does not speak to any obligation of an employer, and only speaks to the obligations of the plan itself, and its fiduciaries.

18 USC § 1027 provides:

> "Whoever, in any document required by Title I of the Employment Retirement Income Security Act of 1974 * * * to be published, or kept as part of the records of any employee welfare benefit plan or employee pension benefit plan, or certified to the administrator of any such plan, makes any false statement or representation of facts, knowing it to be false, or knowingly conceals, covers up, or fails to disclose any fact the disclosure of which is required by such Title or is

> necessary to verify, explain, clarify or check for accuracy and completeness any report required by such Title to be published or any information required by such title to be certified, shall be fined not more than $10,000.00, or imprisoned not more than five years, or both."

The Monthly Contribution Reports submitted monthly to the Welfare Fund, and the Employee Billing Change and Corrections Forms submitted monthly to the Central States Pension Fund were alleged to fit within the language of § 1027.

18 USC § 1027 does not speak in any way whatsoever to any "employee billing changes and corrections forms" or "monthly contribution reports", which are prepared by an *employer*. § 1027 speaks only to documents required by E.R.I.S.A. to be kept as part of the records of the Plan. That Statute speaks to the Plan itself, or a fiduciary of the Plan, knowingly falsifying the Plan's records. The Statute is intended to protect the Plan itself from being defrauded by its fiduciaries. It does not speak to actions of an employer in filling out some form which is sent by the Plan itself for the Plan's administrative convenience.

Essentially, this analysis must consider (1) *who* is or is not covered by § 1027, and (2) *what* is or is not included within § 1027? Appellants argue that an employer, acting solely in his capacity as employer, is not covered; the forms involved in this case, completed by the employer for submission to the funds are not included in § 1027.

The provisions of the Employee Retirement Income Security Act, 29 USC § 1001, *et seq*. further support this interpretation. 29 USC 1001 (b) provides:

> "It is hereby declared to be the policy of this Act to protect interstate commerce in the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies * * * ."

29 USC § 1002 (14) (A), indicates a fiduciary to be "including, but not limited to, any administrator, officer, trustee, or custodian" of an employee benefit plan.

29 USC § 1027, captioned "Retention of Records" provides that

> "every person subject to a requirement to file any description or report or to certify any information therefor under this subchapter * * * shall maintain records on the matters of which disclosure is required which will provide in sufficient detail the necessary basic information and data from which the documents required may be verified * * * and shall include vouchers, work sheets, receipts, and applicable resolutions."

It is *those records* which are included in 18 USC § 1027. However, 29 USC § 1027 speaks only to those persons "subject to a requirement to file any description or report or to certify any information therefor under this subchapter." An employer is not such a "person."

The legislative history of § 1027 leads to the inescapable conclusion that this statute was directed toward improper activities by those connected with the welfare and pension plans themselves. *See generally*, 1962 U.S. Code Congressional and Administrative News, pages 1532-1554.

18 USC § 1027 was added to Title 18 in 1962 along with two other provisions, § 664 and § 1954, as part of the Welfare and Pension Plan Disclosure Act (WPPDA).

The 1962 amendments to WPPDA were enacted in the wake of concerns "that the worker whose benefits are destroyed through the looting of a fund finds no solace from the fact that his was only an isolated case." *Id.* 1536.

The "looting of funds" is done, at the risk of stating the obvious, by those close enough to the fund to have access thereto. The Special Subcommittee on Labor held hearings in 1961, and "there came to light certain instances of dishonesty, looting and diversion of funds which had weakened some plans to the point that there was danger that the anticipated benefits would not be available when needed. *Id.* 1535.

Further, the Secretary of Labor and others testified "that many thousands of covered plans had not been filed; that over 25,000 plans for both 1959 and 1960 were delinquent in reporting their finances and operations * * * ." *Id.* 1536.

Again, it was in light of *those* findings that the Congress determined that those persons responsible for the operation of the welfare and pension plans themselves should face substantial criminal penalties for failure to live up to their fiduciary obligations.

In 1974, E.R.I.S.A. was enacted, and replaced WPPDA. WPPDA and ERISA, at least Title I thereof, are consistent insofar as these arguments are concerned. If anything, ERISA simply clarifies and buttresses the interpretation urged above that the purpose of these statutes is to protect Pension and Welfare Funds from being "looted" by their fiduciaries.

House Report 93-533, 1974 US Code Congressional and Administrative News, p. 4641, discusses the purpose behind WPPDA (of which § 1027 is part):

"However, not until 1958, with the enactment of [WPPDA] was legislation effected which was specifically designed to exercise regulatory controls over pension and welfare funds. Based upon disclosure of malfeasance and improper activities by *pension administrator, trustees, or fiduciaries*, the act was amended in 1962 to designate certain acts of conduct as federal crimes when they occurred in connection with welfare and pension plans." (Emphasis added)

The purpose of the Statute is to protect the funds against looting by those persons with access to the Pension and Welfare Funds. Inasmuch as Petitioners do not fit the description of administrators, trustees, fiduciaries or agents of the pension and welfare funds, they are not subject to the provisions of 18 USC § 1027.

Of the three previously reported cases involving criminal prosecution under 18 USC § 1027, *all* involved persons connected with the funds.

Thus, in *United States* v *Santiago*, 528 F 2d 1130 (2nd Cir. 1976), there was a prosecution of a union president who was the administrator and trustee of the union's welfare fund. In *United States* v *Tolkow*, 532 F 2d 853 (2nd Cir. 1976), the Defendant was a trustee of a welfare fund. Finally, in *United States* v *McCrae*, 344 F Supp 942 (E.D. Pa. 1972), the Defendant was a fiduciary of an employee benefits plan.

Thus, in the only previously reported cases involving violations under 18 USC § 1027, prosecutions were conducted against fiduciaries, administrators or trustees of the funds.

The Court of Appeals' opinion in the instant case finds the general introductory "whoever" language of § 1027 to be all-inclusive and "unambiguous."

To focus only on the word "whoever" ignores the pronouncement of this Honorable Court in *Richards* v *United States*, 369 US 1, 11 (1962) that it is "fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, we must not be guided by a single sentence or a member of a sentence, but [should] look to the provision of the whole law, and to its object and policy."

Further, as this Court noted in *United States* v *Turkette*, 452 US 576, 580 (1981), "there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language," and in construing statutes "absurd results are to be avoided and internal inconsistencies in the statute must be dealt with." *Accord, S.E.C.* v *Ambassador Church Finance & Development Group, Inc.*, 679 F 2d 608 (6th Cir. 1982). In *United States* v *Kirby*, 74 US (7 Wall.) 482, 486-87 (1868) this Court noted:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

It has long been settled that a statute is not to be read overliterally. *E.g.*, *Lynch* v *Overholser*, 369 US 705, 710 (1962). *United States* v *Stauffer Chemical Co.*, 684 F 2d 1174, 1183 (6th Cir. 1982). Statutes must be interpreted in light of the spirit in which they were written and the reasons for their enactment. *Id.*, *National Woodwork Mfrs. Assn.* v *United States*, 386 US 612 (1967). As the court noted in *Monarch Life Insurance Company* v *Loyal Protective Life Insurance Co.*, 326 F 2d 841, 845 (2d Cir.

1963); "With his [Judge Learned Hand] customary eloquence, he stated that 'the duty of ascertaining [the] meaning [of a statute] is difficult at best, and one certain way of missing it is by reading it literally' * * * ." *Accord, Viacom International* v *F.C.C.*, 672 F 2d 1034 (2d Cir. 1982).

In *Watt* v *Alaska*, 451 US 259; 101 S Ct 1673 (1981), the plain language of the statute was urged to preclude further resort to legislative history. This Court stated that

> "ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. * * * The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." 101 S Ct at 1677.

Further, the Court, quoting Judge Learned Hand in *Cabell* v *Markham*, 148 F 2d 737, 739 (2d Cir), *aff'd*, 326 US 404 (1945) stated:

> "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing, be it a statute, a contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." 101 S Ct at 1677, n. 9.

In *United States* v *Sidelko*, 248 F Supp 813 (M.D. Pa. 1965), the Court considered the application of 18 USC Sec. 1461, to a person receiving obscene matter through the mails. The statute provided:

> "*Whoever* knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything * * * nonmailable * * * shall be [punished]."

Defendant in *Sidelko* claimed that this language did not cover one who *received* the material, despite the "whoever uses" language. The Court agreed, despite the broad "whoever" language, and held:

> "To interpret the amendment to Section 1461 as providing that it is a federal crime for any member of the general public to order and receive nonmailable matter, even though it is intended solely for personal use and consumption, would open up a new and vast expanse for federal prosecutors. * * * Federal Courts should be wary of expanding the potential limits of statutory crimes unless Congress clearly manifest an intention to do so." 248 F Supp at 815.

In the case at bar, as well, despite the seeming limitless scope of "whoever" in 18 USC Sec. 1027, the statute was never intended to apply to employers. The legislative history of the statute makes any other conclusion impossible. To allow the decision to stand, in this first case of such potentially sweeping import to every employer of persons covered by an ERISA welfare or pension plan, "would open up a new and vast expanse of federal prosecutions," where Congress has not "clearly manifested an intention to do so." *Id.*

Accordingly, this Petition should be granted as it raises an important question of federal criminal law, with far-reaching implications for employers required to report and contribute to pension and health and welfare funds, which has not been, but should be, addressed by this Honorable Court.

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: July 29, 1983

APPENDICES

APPENDIX A

TEXT OF STATUTES INVOLVED

18 USC § 1027

§ 1027. False statements and concealment of facts in relation to documents required by the Employee Retirement Security Act of 1974

Whoever, in any document required by the title I of the Employee Retirement Income Security Act of 1974 (as amended from time to time) to be published, or kept as part of the records of any employee welfare benefit plan or employee pension benefit plan, or certified to the administrator of any such plan, makes any false statement or representation of fact, knowing it to be false, or knowingly conceals, covers up, or fails to disclose any fact the disclosure of which is required by such title or is necessary to verify, explain, clarify or check for accuracy and completeness any report required by such title to be published or any information required by such title to be certified, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

18 USC § 2

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

29 USC § 1002

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pension on retirement or death, and insurance to provide such pensions).

(2) (A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program —

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standard and purposes of this Act providing one or more exempt categories under which —

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor since retirement),

shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this Act applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

(4) The term "employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees or such employer or members or such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust estate, unincorporated organization, association, or employee organization.

* * *

(13) The term "Secretary" means the Secretary of Labor.

(14) The term "party in interest" means, as to an employee benefit plan —

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of —

(i) the combined voting power of all classes of stock entitled to vote or the total value of

shares of all classes of stock of a corporation.

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C) or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of —

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venture of a person described in subparagraph (B), (C), (D), (E), or (G).

* * *

(21) (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or

discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

* * *

(37) (A) the term "multiemployer plan" means a plan —

- (i) to which more than one employer is required to contribute,
- (ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and
- (iii) which satisfies such other requirements as the Secretary may by regulations prescribe.

29 USC § 1003

§ 1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained —

- (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or
- (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
- (3) by both.

29 USC § 1021

§ 1021. Duty of Disclosure and reporting

Summary plan description and information to be furnished to participants and beneficiaries

(a) The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan —

(1) a summary plan description in section 1022(a)(1) of this title; and
(2) the information described in section 1024(b)(3) and 1025(a) and (c) of this title.

Plan description, modifications and changes, and reports to be filed with Secretary of Labor

(b) The administrator shall, in accordance with section 1024(a) of this title, file with the Secretary —

(1) the summary plan description described in section 1022(a)(1) of this title;
(2) a plan description containing the matter required in section 1022(b) of this title;
(3) modifications and changes referred to in section 1022(a)(2) of this title;
(4) the annual report containing the information required by section 1023 of this title; and
(5) terminal and supplementary reports as required by subsection (c) of this section.

29 USC § 1022

§ 1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in setion 1024(b) of this title. The summary plan description shall include the

information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. * * *

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1) of this title.

29 USC § 1023

§ 1023. Annual reports

Publication and filing

(a)(1)(A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 1024(a) of this title, and shall be made available and furnished to participants in accordance with section 1024(b) of this title.

* * *

(2) With respect to an employee pension benefit plan: a statement of assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of revenues and expenses and other changes aggregated by general source and application. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan * * * the funding policy * * * a description of the agreements and transactions with persons known to be parties in interest; * * * and any other matters necessary to fully and fairly present the financial statements of such pension plan.

(3) With respect to all employee benefit plans, the statement required under paragraph (1) or (2) shall have attached the following information in separate schedules:

(A) a statement of the assets and liabilities of the plan aggregated by categories and valued at their current value, and the same data displayed in comparative form for the end of the previous fiscal year of the plan;

* * *

Information to be furnished by the administrator

(c) The administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan.

(2) The name and address of each fiduciary.

(3) Except in the case of a person whose compensation is minimal (determined under regulations of the Secretary) and who performs solely ministerial duties (determined under such regulations), the name of each person (including but not limited to, any consultant, broker, trustee, accountant, insurance carrier, actuary, administrator, investment manager, or custodian who rendered services to the plan or who had transactions with the plan) who received directly or indirectly compensation from the plan during the preceding year for services rendered to the plan or its participants, the amount of such compensation, the nature of his services to the plan or its participants, his relationship to the employer of the employees covered by the plan, or the employee organization, and any other office, position, or employment he holds with any party in interest.

29 USC § 1024

§ 1024. Filing and furnishing of information

Filing of annual report, plan description, summary plan description, and modification and changes with Secretary

(a)(1) The administrator of any employee benefit plan subject to this part shall file with the Secretary —

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing);

29 USC § 1027

§ 1027. Retention of records

Every person subject to a requirement to file any description or report or to certify any information therefor under this subchapter or who would be subject to such a requirement but for an exemption or simplified reporting requirement under section 1024(a)(2) or (3) of this title shall maintain records on the matters of which disclosure is required which will provide in sufficient detail the necessary basic information and data from which the documents thus required may be verified, explained, or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than six years after the filing date of the documents based on the information which they contain, or six years after the date on which such document would have been filed but for an exemption or simplified reporting requirement under section 1024(a)(2) or (3) of this title.

APPENDIX B

JUDGMENTS AND COMMITMENT ORDERS

(United States District Court
Eastern District of Michigan)

(Filed December 17, 1981)

(United States of America vs. Silverio Vitello, Defendant — Docket No. 81-80161-02)

Counsel: In the presence of the attorney for the government the defendant appeared in person on this date: December 17, 1981
☒ With Counsel: David F. DuMouchel

Plea: ☒ Not Guilty

Finding & Judgment: There being a verdict of
☐ Not Guilty as to counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21.
☒ Guilty as to counts 20, 22, and 23.
Defendant has been convicted as charged of the offense(s) of: false statements in violation of 18:USC:1027 and 2, as charged in Count 20; mail fraud, in violation of 18:USC:1341, as charged in Count 22; and conspiracy, in violation of 18:USC:371, as charged in Count 23.

Sentence or Probation Order: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a

period of Two (2) years as to Count 20; Two (2) years as to Count 22; and Two (2) years as to Count 23. Said sentences on Counts 22 and 23 to run concurrently with the sentence on Count 20.

It Is Further Adjudged that the defendant pay a fine to the United States in the sum of $10,000.00 as to Count 20 only.

The defendant's motion for an appeal bond was granted, and the current bond will continue in effect until expiration of the appeal period.

Additional Conditions of Probation: In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation: The court orders commitment to the custody of the Attorney General and recommends, ______________________________

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed By: /s/ James P. Churchill
☒ U.S. District Judge

Date: December 17, 1981

(United States District Court
Eastern District of Michigan)

(Filed December 17, 1981)

(United States of America vs. Anna Vitello, Defendant — Docket No. 81-80161-03)

Counsel: In the presence of the attorney for the government the defendant appeared in person on this date: December 17, 1981

☒ With Counsel: Robert S. Harrison

Plea: ☒ Not Guilty

Finding & Judgment: There being a verdict of

☐ Not Guilty as to counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 21.

☒ Guilty as to counts 18, 20, 22, and 23.

Defendant has been convicted as charged of the offense(s) of: false statements in violation of 18:USC:1027 and 2, as charged in Counts 18 and 20; mail fraud, in violation of 18:USC:1341, as charged in Count 22; and conspiracy, in violation of 18:USC:371, as charged in Count 23.

Sentence or Probation Order: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) years on Count 18; Two (2) years on Count 20; Two (2) years on Count 22; and Two (2) years on Count 23. Said sentences on Counts 20, 22 and 23 to run concurrently with the sentence on Count 18.

It Is Further Adjudged that the defendant pay a fine to the United States in the sum of $1,000.00 as to Count 18; $10,000.00 as to Count 20; making a total fine of $11,000.00. The fine on Count 20 is a committed fine and the defendant is ordered to stand committed until the fine is paid or she is otherwise discharged by due course of law.

The defendant's motion for an appeal bond was granted, and the current bond will continue in effect until expiration of the appeal period.

Additional Conditions of Probation: In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation: The court orders commitment to the custody of the Attorney General and recommends, ______________________________

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed By: /s/ James P. Churchill
☒ U.S. District Judge

(Certification Omitted)

(United States District Court
Eastern District of Michigan)

(Filed December 17, 1981)

(United States of America vs. S & Vee Cartage Company, Defendant — Docket No. 81-80161-01)

Counsel: In the presence of the attorney for the government the defendant appeared in person on this date: December 17, 1981

☒ With Counsel: Robert S. Harrison

Plea: ☒ Not Guilty

Finding & Judgment: There being a verdict of

☐ Not Guilty as to counts 1 through 7, 14 through 17, and 19 and 21.

☒ Guilty as to counts 8 through 13, and 18, 20, 22 and 23.

Defendant has been convicted as charged of the offense(s) of: false statements in documents required to be kept by the Employee Retirement Income Security Act of 1974, in violation of 18:USC:1027, as charged in Counts 1-20; mail fraud, in violation of 18:USC:1341, as charged in counts 21 and 22; and conspiracy in violation of 18:USC:371, as charged in Count 23.

Fine Only: It Is Adjudged that the defendant pay a fine to the United States in the sum of $3,000.00 on *each* of the following counts: 8, 9, 10, 11, 12, 13, 18, and 20; and $500.00 on count 22 and $500.00 on count 23, making the total fine in the sum of $25,000.00.

Signed By: /s/ James P. Churchill
☒ U.S. District Judge

Date: December 17, 1981

APPENDIX C

OPINION

(United States Court of Appeals,
Sixth Circuit)

(Argued January 31, 1983)
(Decided April 14, 1983)

(United States of America, Plaintiff-Appellee, v. S & Vee Cartage Company, Inc., Silverio Vitello aka Sal Vitello, and Anna Vitello, Defendants-Appellants — No. 81-1801)

* * *

Before: Lively, Circuit Judge, and Phillips and Brown, Senior Circuit Judges.

Phillips, Senior Circuit Judge.

Defendants S & Vee Cartage Company, Inc., Silverio Vitello and Mrs. Anna Vitello appeal from jury convictions on charges of knowingly making false statements in documents required to be kept by employee welfare and pension funds (18 U.S.C. §§ 1027 and 2 (1976)); conspiracy to make false statements in these documents (18 U.S.C. § 371 (1976); and mail fraud (18 U.S.C. § 1341 (1976). The principal issue raised on appeal is whether 18 U.S.C. § 1027 was intended by Congress to cover employers. Other contentions are that the District Court improperly instructed the jury as to the mens rea required to violate 18 U.S.C. § 1027; that a corporation may not be convicted of conspiring with its officers; and that there was insufficient evidence to sustain the conviction of defendant Silverio Vitello. We find all of appellants' arguments to be without merit and affirm their convictions.

I

S & Vee Cartage Company (S & Vee) is a steelhauling business located in Detroit and Warren, Michigan. Defendant Silverio Vitello is the president, treasurer and chief operating officer of the company. His wife, Mrs. Anna Vitello, is the sole shareholder, the vice president and the secretary of the company. The corporation has no other officers or directors.

In 1973, S & Vee became a party to certain collective bargaining agreements with Locals 299 and 124 of the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America. Pursuant to these agreements, S & Vee was required to make contributions for all its regular employees to the Central States Southeast and Southwest Areas Pension Fund (Pension Fund), and the Michigan Conference of Teamsters Welfare Fund (Welfare Fund). The mechanism by which S & Vee was required to report its eligible employees and the amount of contributions due the Pension Fund was the Employee Billing Changes and Corrections forms (EBCC forms). S & Vee was required to complete and send these forms to the Pension Fund each time there was a material change in the status of its employees. A similar mechanism was used for reporting to the Welfare Fund. S & Vee was required to complete and send to the Welfare Fund Monthly Contribution Reports (MCRs).

The evidence presented at trial showed, to the satisfaction of the jury, that the defendants-appellants conspired to devise, and carried out, a scheme to defraud the Pension Fund, the Welfare Fund and its employees of contributions owed by S & Vee to these funds. Specifically, defendants S & Vee and Anna Vitello falsified a November 6, 1978, EBCC form sent to the

Pension Fund by understating the number of its eligible employees. During 1979, defendant S & Vee falsified six MCRs that were sent to the Welfare Fund by understating again the number of eligible employees, understating the amount of contributions due, and naming two individuals as eligible employees when they were not eligible. In addition, all three defendants falsified an August 6, 1979, form which ultimately was sent to the Pension Fund by understating the number of eligible employees and by listing, as terminated, employees who were added after a March 1979 Pension Fund audit of S & Vee and who remained active and eligible beyond August 6, 1979.

After the jury verdicts, the District Court fined S & Vee a total of $25,000. Mr. and Mrs. Vitello each were sentenced to a total of two years imprisonment, and fined $10,000 and $11,000 respectively.

II

The question concerning whether 18 U.S.C. § 1027 covers employers appears to be one of first impression. The statute provides as follows:

> *Whoever*, in any document required by title I of the Employee Retirement Income Security Act of 1974 (as amended from time to time) to be published, or kept as part of the records of any employee welfare benefit plan or employee pension benefit plan, or certified to the administrator of any such plan, makes any false statement or representation of fact, knowing it to be false, or knowingly conceals, covers up, or fails to disclose any fact the disclosure of which is required by such title or is necessary to verify, explain, clarify or check for accuracy and

> completeness any report required by such title to be published or any information required by such title to be certified, shall be fined not more than $10,000, or imprisoned not more than five years, or both. (Emphasis supplied.) 18 U.S.C. § 1027 (1976).

Appellants contend that they, as employers, are not covered by this section because Congress intended it to cover only fiduciaries of employee welfare and pension funds, and also because the forms and reports sent by them to the funds involved in the present case are not the types of documents referred to in the statute. Relying first on the legislative history behind § 1027 and the acts it was designed to enforce, appellants note the frequent references to welfare and pension plan fiduciaries and the concern expressed for dealing with abuses in the administration of these types of funds. *See* H.R.Rep. 93-533, 93rd Cong., 2nd Sess., *reprinted in* 1974 U.S.Code Cong. & Ad.News 4639, 4639-43; H.R.Rep. 998, 87th Cong., 2nd Sess. *reprinted in* 1962 U.S.Code Cong. & Ad.News 1532, 1532-51; S.Rep. No. 1440, 85th Cong., 2nd Sess, *reprinted in* 1958 U.S.Code Cong. & Ad.News 4137-47. Second, they focus on the fact that the few reported cases involving prosecutions brought under § 1027 have dealt with fiduciaries of employee benefit funds. *See United States* v. *Tolkow*, 532 F.2d 853 (2nd Cir. 1976); *United States* v. *Santiago*, 528 F.2d 1130 (2d Cir.), *cert. denied*, 425 U.S. 972, 96 S.Ct. 2169, 48 L.Ed.2d 795 (1976); *United States* v. *McCrae*, 344 F.Supp. 942 (E.D.Pa.1972). Third, with respect to the types of documents involved, they point out that the statute refers to false statements made in documents required "to be published, or kept as part of the records of any employee welfare benefit plan or employee pension benefit plan, or certified to the administrator of any such plan . . . ." EBCC forms and MCRs, they contend, do not fall into any of these categories.

We find the arguments of appellants to be unimpressive. The statute, 18 U.S.C. § 1027, provides in broad language, unequivocally and without limitation, that "[w]hoever" knowingly makes any false statement or conceals facts in any documents required by Title I of the Employee Retirement Income Security Act of 1974 (E.R.I.S.A.) to be published, or kept by an employee benefit plan or certified to the administrator of any such plan, may be held criminally culpable. No differentiation is made between an employer or a fiduciary of an employee benefit or welfare fund.

The rule of statutory construction in such a situation was stated by the Supreme Court in *United States* v. *Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981):

> In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980).

[1] "Whoever" clearly is sufficiently broad to include employers as well as fiduciaries. We conclude that appellants, as an "employer," are included within the provisions of § 1027.

The only relevant limitation found in § 1027 deals with the type of documents containing false statements. Although EBCC reports and MCRs are not required "to be published" or "certified to an administrator" of an employee benefit plan, the evidence establishes that they are covered by § 1027 because they are required "to be kept" under § 107 of E.R.I.S.A., 29 U.S.C. § 1027 (1976).

29 U.S.C. § 1027, entitled "Retention of Records," provides as follows:

> Every person subject to a requirement to file any description or report or to certify any information therefor under this subchapter or who would be subject to such a requirement but for an exemption or simplified reporting requirement under section 1024(a)(2) or (3) of this title shall maintain records on the matters of which disclosure is required which will provide in sufficient detail the necessary basic information and data from which the documents thus required may be verified, explained, or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than six years after the filing date of the documents based on the information which they contain, or . . . . 29 U.S.C. § 1027 (1976).

The EBCC forms and MCRs must be retained under this section because they contain the necessary information and data from which annual reports, required under 29 U.S.C. §§ 1023(a)(2)(A) and 1024(a) (1976) to be published and sent by the administrator of a fund to the Secretary of Labor, "may be verified, explained, or clarified, and checked for accuracy and completeness . . . ." The evidence shows that these documents constitute the primary source, if not the sole source, available to trustees of pension and welfare funds with respect to the names of the employees covered and the amount of contributions made by employers.

A federal regulation, 29 C.F.R. § 486(3)(c) (1982), supports the conclusion that employer documents of this type are required to be retained under § 107 of E.R.I.S.A. This regulation originated as a 1963 Department of Labor interpretative bulletin relating to record retention requirements under the predecessor of E.R.I.S.A., § 11 (29 U.S.C. § 308b) of the Welfare and Pension Plan Disclosure Act of 1958 (W.P.P.D.A.), Pub.L. 85-836, 72 Stat. 997, *reprinted in* 1958 U.S.Code Cong. & Ad.News 1172-80, *repealed by*, The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1976 & Supp. V 1981). The language in § 11 of the W.P.P.D.A. is virtually identical to that in § 107 of E.R.I.S.A. There is no indication that the requirement for the retention of these types of records was changed by the enactment of E.R.I.S.A.

[2] The regulation provides as follows:

> (c) Records maintained shall also include, where appropriate, information certified to the Administrator by an insurance carrier or service or other organization. Other records such as payrolls from contributing employers, which the reporting person, trustee, or organization, as described in § 486.2 obtains in the regular course of its operations, to the extent such records may be used for said verifying or checking shall also be retained.

29 C.F.R. § 486(3)(c) (1982).

Since EBCC forms and MCRs, like employee payrolls, are used by trustees of welfare and pension funds for "verifying and checking," it follows that they are required to be retained under § 107 of E.R.I.S.A., 29 U.S.C. § 1027 (1976). Therefore, we reject the argument of appellants that the documents containing the false statements in this case are not covered by the statute.

Likewise, we find no expression of legislative intent contrary to the broad language of 18 U.S.C. § 1027, which we conclude is applicable to employers who knowingly make false statements in E.R.I.S.A. documents. *See United States* v. *Turkette, supra*, 452 U.S. at 580, 101 S.Ct. at 2527. In 1958, Congress enacted the Welfare and Pension Plans Disclosure Act (W.P.P.D.A.), Pub.L. 85-836, 73 Stat. 997, *reprinted in* 1958 U.S.Code Cong. & Ad.News 1172, *repealed by* The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1976 & Supp. V 1981). The W.P.P.D.A. was enacted after a comprehensive investigation into numerous abuses in the administration of employee welfare and pension plans. The general goal of the W.P.P.D.A. was to protect participants and beneficiaries of these types of plans by requiring the plans to disclose and report financial information.

Section 1027 was added later as part of the Welfare and Pension Plans Disclosure Act Amendments of 1962, Pub.L. 87-420, 76 Stat. 35, *reprinted in* 1962 U.S.Code Cong. & Ad.News 43, 51. It was enacted along with two other new criminal statutes, 18 U.S.C. § 644 (dealing with theft or embezzlement from employer benefit plans) and 18 U.S.C. § 1954 (dealing with kickbacks or conflict of interest payments to influence the operations of such plans). In these enactments Congress intended to provide the "enforcement teeth which [were] lacking in the existing law . . . ." H.Rep. No. 998, 87th Cong., 2d Sess., *reprinted in* 1962 U.S.Code Cong. & Ad.News 1532, 1537.

In 1974, E.R.I.S.A. was enacted to supersede the W.P.P.D.A. Section 1027 was amended so as to refer to E.R.I.S.A. but no alterations were made in its broad language to limit its scope. *See* 29 U.S.C. § 1031(a)(2)(B)(i) (1976).

Finally, it is obvious that the intention of Congress in enacting the broad language of 18 U.S.C. § 1027 is not affected in any way by the happenstance that three reported cases dealing with criminal prosecutions under 18 U.S.C. § 1027 involved fiduciaries, and not employers, *United States* v. *Tolkow, supra*, 532 F.2d 853 (2nd Cir. 1976) (involving a trustee of a union pension fund); *United States* v. *Santiago, supra*, 528 F.2d 1130 (2nd Cir.), *cert. denied*, 425 U.S. 972, 96 S.Ct. 2169, 48 L.Ed.2d 795 (1976) (involving the president of a local chapter of the AFL-CIO, who was also the trustee of the union welfare fund); and *United States* v. *McCrae, supra*, 344 F.Supp. 942 (E.D.Pa. 1972) (in which the defendant was the salaried supervisor for two employee benefit funds).

We agree with the language of *Central States, Southeast and Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981), which suggests that employers are covered by 18 U.S.C. § 1027. Although *CRST* involved the right of some pension funds to inspect certain employment and earning records held by an employer, the court noted that "criminal sanctions are also available in the event an employer knowingly fails to disclose or conceals facts required by ERISA to be published or certified to the administrator of an employee benefit or pension plan." *Id.* at 619 n. 1. The court cited 18 U.S.C. § 1027. *Id.*

III

Appellants assert that District Judge James P. Churchill committed reversible error in failing to instruct the jury that some degree of criminal intent was necessary in order to violate 18 U.S.C. § 1027. Section 1027 imposes criminal liability upon one who makes "any false statement or representation of fact, *knowing* it to be false, or *knowingly* conceals, covers up, or fails to disclose any fact the disclosure of which is required by [ERISA]

. . . ." (Emphasis added.) At the trial, appellants contended that this is a specific intent crime and requested a standard specific intent instruction, stating basically that appellants had to intend to violate the law in order to be convicted. After a lengthy discussion with the attorneys, and over defense objections, Judge Churchill decided not to use either of the terms "specific intent" or "general intent" in the instruction of § 1027. Instead, he instructed on the specific mental state referred to in the statute — the concept of an act done "knowingly." The instruction given to the jury on this point is set forth in footnote 1 below.[1]

The thrust of the argument of appellants is that the instruction on the term "knowingly" did not constitute an instruction on criminal intent. They claim, in effect, that the District Judge was required to recite a standard instruction of the term "specific intent," or at least "general intent," in order to inform the jury properly of the mental state required by § 1027.

[3] We hold that the instructions given by District Judge Churchill sufficiently informed the jury of the

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[1] The word "knowingly" is used defining the third element of the offense.

An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

An omission or a failure to act is "knowingly" done if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

The purpose of adding the word "knowingly" is to insure that no one will be convicted of an omission, or failure to act, due to mistake, or accident, or other innocent reason.

A statement or representation is "false" within the meaning of this statute, if untrue when made, and then known to be untrue (by the person making it or causing it to be made) or made with reckless indifference as to its truth or falsity or with a conscious purpose to avoid learning the truth.

mens rea required for a conviction under 18 U.S.C. § 1027. We agree with the holding in *United States* v. *Tolkow, supra*, 532 F.2d 853, 858 (2nd Cir. 1976), that a specific intent to do what the law forbids is not required for a violation of § 1027. *See also* Annotation, "Criminal Liability under 18 USCS § 1027 As To Documents Required By Pension Reform Act," 34 A.L.R.Fed. 856 (1977). In *Tolkow*, the Second Circuit stated that the term "knowingly" in § 1027 requires only "proof of a voluntary conscious failure to disclose without ground for believing that such non-disclosure is lawful, or with reckless disregard for whether or not it is lawful." 532 F.2d at 828. In light of this holding, it was not error for the District Court in the present case to deny appellants' request for a specific intent instruction.

[4] Nor was it error for the court to deny appellants' request for an instruction on the term "general intent." A court may properly instruct the jury about the necessary mens rea without resorting to the words "specific intent" or "general intent." *United States* v. *Arambasich*, 597 F.2d 609, 612 (7th Cir. 1979). *See also United States* v. *Gregg*, 612 F.2d 43, 50 (2nd Cir. 1979) (stating that "[a]lthough the charge given by the district court here did not include in haec verba the words 'specific intent,' we hold that the charge, read in its entirety, [citation omitted], was sufficient to instruct the jury as to the *mens rea* necessary for conviction"). It is sufficient to define the precise mental state required by the statute. *United States* v. *Tolkow, supra*, 532 F.2d at 858.

In the present case the instruction of District Judge Churchill was centered around the particular mens rea referred to in § 1027. It also encompassed the major defense offered by appellants, that they were not aware of the falsity of the contents of the documents in

question, by indicating that "[a]n act is done 'knowingly' if done voluntarily and intentionally, and not because of mistake or accident . . . ." We note that the instruction was similar to the one given by the trial court in *Tolkow* and upheld by the Second Circuit. *See Tolkow*, 532 F.2d at 859.

We find no reversible error in the charge of District Judge Churchill to the jury.

IV

Appellants each contend that their convictions for conspiracy to make false statements in documents required to be kept by employee welfare and pension funds should be reversed on the theory that a criminal conspiracy cannot exist between a corporation and its officers, acting as agents of the corporation. They rely mainly on two district court decisions in support of this proposition. *Jagielski* v. *Package Mach. Co.*, 489 F.Supp. 232 (E.D.Pa. 1980) (involving a civil conspiracy claim); and *United States* v. *Carroll*, 144 F.Supp. 939 (S.D.N.Y. 1956). The reasoning set forth in these cases is that, based on agency principles, the acts of corporate officers or employees become the acts of the corporation; and since a corporation may not conspire with itself, no conspiracy may be found between a corporation and its agents. In addition, appellants cite a number of civil conspiracy cases involving antitrust litigation for a general statement of this theory. *See Tose* v. *First Pennsylvania Bank, N.A.*, 648 F.2d 879, 893-94 (3rd Cir.), *cert. denied*, 454 U.S. 893, 102 S.Ct. 390, 70 L.Ed.2d 208 (1981); *Card* v. *National Life Ins. Co.*, 603 F.2d 828, 834 (10th Cir. 1979); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256, 287 (5th Cir. 1978), *cert. denied*, 440 U.S. 939, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979); *Poller* v. *Columbia Broadcasting System, Inc.*, 284 F.2d 599, 603 (D.C.Cir. 1960); *Aaron E. Levine & Co.* v. *Calkraft Paper Co.*, 429 F.Supp. 1039 (E.D.Mich. 1976).

[5] We hold that in the criminal context a corporation may be convicted of conspiring with its officers. Support for this holding is found in a number of decisions. *See, e.g., United States* v. *Hartley*, 678 F.2d 961, 970-73 (11th Cir. 1982); *Dussouy* v. *Gulf Coast Inv. Corp.*, 660 F.2d 594, 602-04 (5th Cir. 1981); *Novotny* v. *Great American Federal Savings & Loan Ass'n.*, 584 F.2d 1235, 1256-59 (3rd Cir. 1978) (en banc), *vacated on other grounds*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979). We adhere to the reasoning set forth in *United States* v. *Hartley*, 678 F.2d at 970:

> The difficulty in accepting the theory of intracorporate conspiracy is conceptual. Under elementary agency principles, a corporation is personified through the acts of its agents. Thus, the acts of its agents become the acts of the corporation as a single entity. The conceptual difficulty is easily overcome, however, by acknowledging the underlying purpose for the creation of this fiction — to expand corporate responsibility.
>
> By personifying a corporation, the entity was forced to answer for its negligent acts and to shoulder financial responsibility for them. *See Dussouy* v. *Gulf Coast Investment Corp.*, 660 F.2d 594, 608 (5th Cir. 1981). The fiction was never intended to prohibit the imposition of criminal liability by allowing a corporation or its agents to hide behind the identity of the other. We decline to *expand* the fiction only to *limit* corporate responsibility in the context of the criminal conspiracy now before us.

See also United States v. *Wise*, 370 U.S. 405, 417, 82 S.Ct. 1354, 1362, 8 L.Ed.2d 590 (1962) (Harlan, J., concurring) (stating that "the fiction of corporate entity, operative to protect officers from contract liability, had never been applied as a shield against criminal prosecutions . . . .").

Statements made in antitrust cases to the effect that a corporation is incapable of conspiring with its agents generally have been distinguished as limited in application to the concept of "enterprises" found in § 1 of the Sherman Act. *See United States* v. *Hartley, supra,* 678 F.2d at 971; *Dussouy* v. *Gulf Coast Inv. Corp., supra,* 660 F.2d at 603.

[6] The law views S & Vee as a distinct legal entity, separate from Mr. and Mrs. Vitello. It is, therefore, possible for a conspiracy to exist between these parties. We affirm the conspiracy convictions of all appellants.

V

Finally, defendant Silverio Vitello claims that the evidence introduced at the trial was insufficient to support his convictions. He was convicted of one count of knowingly making false statements in an EBCC form sent to the Central States Southeast and Southwest Areas Pension Fund; one count of conspiracy to make false statements in ERISA documents; and one count of mail fraud. All of these charges arose out of his involvement with an August 6, 1979, EBCC form.

[7] In reviewing the sufficiency of the Government's proof against Mr. Vitello, all evidence and reasonable inferences must be viewed in the light most favorable to the Government. *Glasser* v. *United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *United States* v. *Gibson,* 675 F.2d 825, 829 (6th Cir. 1982); *United States* v. *Green,* 548 F.2d 1261, 1266 (6th Cir. 1977). The ultimate question is whether a reasonable mind might fairly find guilt beyond a reasonable doubt. *Gibson* at 829. After a careful review of the proof offered against Mr. Vitello, we conclude that the evidence was sufficient to sustain his convictions on all counts.

All other arguments presented by appellants have been considered and found to be without merit.

Affirmed.

APPENDIX D

ORDER DENYING REHEARING

(United States Court of Appeals
for the Sixth Circuit)

(Filed June 3, 1983)

(United States of America, Plaintiff-Appellee, v. S & Vee Cartage Company, Inc., et al., Defendants-Appellants — No. 81-1801)

ORDER DENYING PETITION FOR REHEARING AND REHEARING EN BANC

Before: Lively, Circuit Judge, and Phillips and Brown, Senior Circuit Judges.

A majority of the regular active judges of the court have not voted in favor of rehearing en banc. The petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, the court concludes that the petition for rehearing is without merit. Accordingly, it is Ordered that the petition for rehearing and the petition for rehearing en banc be and hereby are denied.

Entered by order of the court.

/s/ John P. Hehman,
Clerk

APPENDIX E

ORDER STAYING MANDATE

(United States Court of Appeals
for the Sixth Circuit)

(Filed June 16, 1983)

(United States of America, Plaintiff-Appellee, vs S & Vee Cartage Company, Inc., et al., Defendants-Appellants — No. 81-1801)

Ordered, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Entered By Order Of The Court
/s/ John P. Hehman,
Clerk